

**JOINT POWERS AGREEMENT
CITY OF MILPITAS and CITY OF FREMONT
RECREATION SERVICES AGREEMENT (2003)**

This Joint Powers Agreement (hereinafter "Agreement") is made and entered into by and between the CITY OF MILPITAS, a municipal corporation (hereinafter "Milpitas"), and the CITY OF FREMONT, a municipal corporation (hereinafter "Fremont").

RECITALS

- A. Milpitas and Fremont are each a "public agency" as defined by Government Code section 6500.
- B. Milpitas and Fremont each share a common power, as defined by Government Code section 6502, generally described as providing recreation services to the public, and more particularly described in this Agreement.
- C. The general purpose of this Agreement is for Fremont to provide recreation services to Milpitas, in return for Milpitas' payment to Fremont, based on the terms more particularly described in this Agreement.
- D. Fremont and Milpitas desire to enter into this Agreement in accordance with the provisions of the Joint Exercise of Powers Act (Government Code sections 6500, *et seq.*), in particular the immunity protections of Government Code section 6513, and the provisions of Government Code sections 895 through 895.8.

NOW, THEREFORE, IN CONSIDERATION OF THE MUTUAL CONVENANTS AND CONDITIONS IDENTIFIED HEREIN, THE PARTIES HEREBY AGREE AS FOLLOWS:

- 1. **SCOPE OF SERVICES.** Milpitas hereby delegates authority to Fremont to perform, and Fremont hereby agrees to perform, the services described in Exhibit "A," attached hereto and incorporated herein by reference, in accordance with the terms and conditions contained in this Agreement.
- 2. **BILLING AND PAYMENT.** In order to request payment for services provided in accordance with this Agreement, Fremont shall submit invoices to Milpitas identifying the services performed and the charges therefor, based upon the payment provisions (set forth on Exhibit "B," attached hereto and incorporated herein by reference). Milpitas shall make payment to Fremont for services performed in accordance with this Agreement within thirty days after receipt of invoice from Fremont. If Milpitas disputes any portion of the request for payment from Fremont, Milpitas shall provide written notice of the dispute to Fremont within thirty days after receipt of invoice from Fremont.
- 3. **AUTHORIZED REPRESENTATIVES.**

3(A). Fremont's Authorized Representative. All services performed by Fremont under this Agreement shall be performed by, or under the supervision of, Fremont's Authorized Representative, **Jeff Gonce**, unless otherwise designed in writing by Fremont's Authorized Representative or the Fremont Assistant City Manager.

3 (B). Milpitas' Authorized Representative. For the performance of services under this Agreement, Fremont shall take direction from Milpitas' Authorized Representative: **Lynette Wilson**, unless otherwise designated in writing by Milpitas' Authorized Representative.

4. INFORMATION AND DOCUMENTATION.

4(A). Accounting Records. Milpitas and Fremont shall maintain all accounting records related to this Agreement in accordance with generally accepted accounting principles and state law requirements, and in no event for less than four years. The accounting records to be maintained in accordance with this Agreement shall include, at a minimum, documents which support Fremont's costs and expenses related to this Agreement, including documentation of requests for services, services performed, invoices, and payments. Each party's accounting records shall be made available to the other party within a reasonable time after request, during normal business hours.

4(B). Ownership of Work Product. All original documents prepared by Fremont (including its employees and agents) for this Agreement ("work product"), whether complete or in progress, are the property of Milpitas, and shall be given to Milpitas at the completion of Fremont's services, or upon demand by Milpitas. Fremont shall have a right to make and keep copies of the work product.

5. RELATIONSHIP BETWEEN THE PARTIES. Milpitas and Fremont are each an independent "public agency," as defined by Government Code section 6500, and this Agreement does not create a separate legal entity. Each party shall, at all times, remain an independent public agency solely responsible for all acts of its employees or agents, including any negligent acts or omissions.

5(A). Fremont (including its employees and agents) is not Milpitas' agent, and shall have no authority to act on behalf of Milpitas, or to bind Milpitas to any obligation whatsoever, unless Milpitas provides prior written authorization to Fremont. Fremont is not an officer or employee of Milpitas, and Fremont shall not be entitled to any benefit, right, or compensation other than that provided in this Agreement.

5(B). Milpitas (including its employees and agents) is not Fremont's agent, and shall have no authority to act on behalf of Fremont, or to bind Fremont to any obligation whatsoever, unless Fremont provides prior written authorization to Milpitas. Milpitas is not an officer or employee of Fremont, and Milpitas shall

not be entitled to any benefit, right, or compensation other than that provided in this Agreement.

6. **COMPLIANCE WITH LAW.** Each party shall comply with all applicable legal requirements including all federal, state, and local laws (including ordinances and resolutions), whether or not said laws are expressly stated in this Agreement.

7. **INSURANCE AND BONDS.**

7(A). Each party shall throughout the duration of this Agreement, maintain insurance (including, for the purpose of this section, self-insurance or coverage under a self-insurance pool) to cover each of their respective interests related to work performed under this Agreement (including coverage for their employees and agents). Concurrently with the execution of this Agreement, and prior to the commencement of any services, each party shall provide the other with written proof of insurance (including self-insurance or self-insurance pool coverage) (certificates and endorsements), in a form acceptable to the other party. Each party shall provide substitute written proof of insurance no later than 30 days prior to the expiration of any insurance coverage required by this Agreement.

7(A)(1). Commercial General Liability (with coverage at least as broad as ISO form CG 00 01 01 96) coverage in an amount not less than \$1,000,000 general occurrence for general liability, bodily injury, personal injury and property damage. Each party shall name the other as an additional covered party or additional insured.

7(A)(2). Automobile Liability (with coverage at least as broad as ISO form CA 00 01 07 97, for "any auto") coverage in an amount not less than \$1,000,000 per accident for bodily injury and property damage.

7(A)(3). Workers' Compensation coverage as required by the State of California.

7(B). The parties hereby agree that, to the extent that a public officer has charge of any property, the public officer for each party shall be that parties' Authorized Representative. However, the parties further agree that, due to the nature of the services provided by Fremont to Milpitas pursuant to this Agreement, the amount of any official bond, as otherwise required by Government Code section 6505.1 shall be \$0.

8. **INDEMNIFICATION.** Fremont shall indemnify, hold harmless, and defend Milpitas (including its elected officials, officers, agents and employees) from and against any and all claims (including all litigation, demands, damages, liabilities, costs, and expenses, and including court costs and attorney's fees) resulting from Fremont's negligent performance, or willful misconduct, under this Agreement. Milpitas shall cooperate with Fremont in the defense of any action required by this section. Notwithstanding the foregoing, if Fremont is held liable upon a

judgement for damages pursuant to this section, and Fremont pays in excess of its pro rata share in satisfaction of such judgement, Fremont is entitled to contribution from Milpitas pursuant to Government Code section 895.6.

9. **TERM OF THE AGREEMENT.** The term of this Agreement shall commence on the date last signed by the parties, below, and shall continue until completion of all services in accordance with the requirements set forth in Exhibit "A" of this Agreement. This Agreement may be terminated by either party without cause upon thirty (30) days written notice to the other party. If Milpitas exercised its right to terminate this Agreement in accordance with this paragraph, Milpitas shall pay Fremont for all services performed in accordance with this Agreement, through and including the date of termination, but not to exceed the payments according to the rates specified in Exhibit "A".
10. **DEFAULT.** If either party ("demanding party") has a good faith belief that the other party ("defaulting party") is not complying with the terms of this Agreement, the demanding party shall give written notice of the default (with reasonable specificity) to the defaulting party, and demand the default to be cured within ten days of the notice. If: (a) the defaulting party fails to cure the default within ten days of the notice, or, (b) if more than ten days are reasonably required to cure the default and the defaulting party fails to give adequate written assurance of due performance within ten days of the notice, then (c) the demanding party may terminate this Agreement upon written notice to the defaulting party.
11. **NOTICES.** All notices required or contemplated by this Agreement shall be in writing and shall be delivered to the respective party as set forth in this section. Communications shall be deemed to be effective upon the first to occur of: (a) actual receipt by a party's Authorized Representative, or (b) actual receipt at the address designated below, or (c) three working days following deposit in the United States Mail of registered or certified mail sent to the address designated below. The Authorized Representative of either party may modify their respective contact information identified in this section by providing notice to the other party.

To: Fremont

Attn: MARS Director
3300 Capitol Ave.
P.O. Box 5006
Fremont, CA 94537

To: Milpitas

Attn: Lynette Wilson
Milpitas Recreation Services
457 E. Calaveras Blvd.
Milpitas, CA 95035

12. **HEADINGS.** The heading titles for each paragraph of this Agreement are included only as a guide to the contents and are not to be considered as controlling, enlarging, or restricting the interpretation of the Agreement.

13. **SEVERABILITY.** If any term of this Agreement (including any phrase, provision, covenant, or condition) is held by a court of competent jurisdiction to be invalid or unenforceable, the Agreement shall be construed as not containing that term, and the remainder of this Agreement shall remain in full force and effect; provided, however, this paragraph shall not be applied to the extent that it would result in a frustration of the parties' intent under this Agreement.
14. **GOVERNING LAW, JURISDICTION, AND VENUE.** The interpretation, validity, and enforcement of this Agreement shall be governed by and interpreted in accordance with the laws of the State of California. Any suit, claim, or legal proceeding of any kind related to this Agreement shall be filed and heard in a court of competent jurisdiction in the County of Alameda.
15. **ATTORNEY'S FEES.** In the event any legal action is commenced to enforce this Agreement, the prevailing party is entitled to reasonable attorney's fees, costs, and expenses incurred.
16. **ASSIGNMENT AND DELEGATION.** This Agreement, and any portion thereof, shall not be assigned or transferred, nor shall any of either party's duties be delegated, without the written consent of the other party. Any attempt to assign or delegate this Agreement without the written consent of the other party shall be void and of no force or effect. A consent to one assignment shall not be deemed to be a consent to any subsequent assignment.
17. **MODIFICATIONS.** Waiver of a breach or default under this Agreement shall not constitute a continuing waiver or a waiver of a subsequent breach of the same or any other provision of this Agreement.
18. **WAIVERS.** Waiver of a breach or default under this Agreement shall not constitute a continuing waiver or a waiver of a subsequent breach of the same or any other provision of this Agreement.
19. **ENTIRE AGREEMENT.** This Agreement, including all documents incorporated herein by reference, comprises the entire integrated understanding between the parties concerning the services described herein. This Agreement supersedes all prior negotiations, agreements, and understandings regarding this matter, whether written or oral. The documents incorporated by reference into this Agreement are complementary; what is called for in one is binding as if called for in all.
20. **EACH PARTY'S ROLE IN DRAFTING THE AGREEMENT.** Each party to this Agreement has had an opportunity to review the Agreement, confer with legal counsel regarding the meaning of the Agreement, and negotiate revisions to the Agreement. Accordingly, neither party shall rely upon Civil Code section 1654 in order to interpret any uncertainty in the meaning of the Agreement.

21. **SIGNATURES.** The individuals executing this Agreement represent and warrant that they have the right, power, legal capacity, and authority to enter into and execute this Agreement on behalf of the respective legal entities of Milpitas and Fremont. This Agreement shall inure to the benefit of and be binding upon the parties herein and their respective successors and assigns.

IN WITNESS WHEREOF, Fremont and Milpitas do hereby agree to the full performance of the terms set forth herein.

CITY OF FREMONT

CITY OF MILPITAS

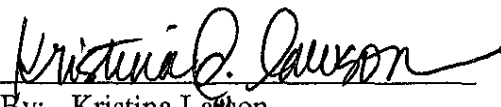
By: Lynn Macy
Title: Assistant City Manager
Date:

By: Bonnie Greiner
Title: Recreation Services Manager
Date:

APPROVED AS TO FORM:

APPROVED AS TO FORM:

By: Michael W. Barrett
Title: Senior Deputy City Attorney



By: Kristina Larson
Title: Assistant City Attorney

EXHIBIT A
(SCOPE OF CONTRACTOR'S DUTIES AND SERVICES)

The City of Fremont – Fremont Tennis Center shall provide an extensive tennis lesson program with the intent of building a strong tennis community in Milpitas.

- The City of Fremont – Fremont Tennis Center shall provide all equipment, personnel supervision, and supplies necessary to complete all tennis teaching programs. Additionally, the City of Fremont – Fremont Tennis Center will carry all the appropriate and normal costs of recruiting, training, managing and maintaining a professional staff for production of tennis teaching lessons.
- The City of Fremont – Fremont Tennis Center shall handle each and every customer inquiry with a timely and professional response.
- The City of Fremont – Fremont Tennis Center would retain the right to set appropriate fees to maintain acceptable operating margins.
- The City of Fremont – Fremont Tennis Center shall provide written class proposals three times a year when requested by Milpitas Recreation Services.
- Contractor agrees to contact Milpitas Recreation Services two (2) days prior to the first class meeting to verify class enrollment. If fewer than the minimum students have enrolled for the course, class status will be determined by the Contractor and Milpitas Recreation Services.
- In the case that a class does not reach the stated minimum prior to the first class meeting and class has not been previously cancelled, the Contractor agrees that he/she will attend the first class meeting without compensation. If, after the first class meeting the stated minimum is still not reached, Milpitas Recreation Services may, at its discretion, cancel the class or, if said class is not canceled, Contractor may elect to cancel the class or conduct the class with a reduced class minimum. In the latter case, compensation will be adjusted by Milpitas Recreation Services.
- Contractor shall be an independent Contractor and the means by which he/she shall accomplish the performance of this work shall be under the sole control of the Contractor. In the performance of any contract resulting for the acceptance of this offer, the contractor shall not be deemed agent, servant or employee of the City of Milpitas.
- It is the intent of the City of Milpitas to award a contract for a one (1) year term with the option to extend for up to two (2) additional years, in accordance with these specifications and as more particularly described in Exhibit A.
- Contractor grants full permission to the City of Milpitas for use of his/her name and photographs, videotapes, motion pictures or recordings for any publicity and promotion purposes without obligation or liability to contractor.
- The Contractor shall direct its staff to wear the required Milpitas Recreation Services Contractor identification badge while teaching lessons, but at no time thereafter.
- The Contractor shall require staff to be on time and if late for a lesson to arrange make up times for missed lessons.
- The City of Milpitas shall provide and maintain tennis facilities used for tennis lessons to insure a safe and clean environment for students and Contractor's staff.
- The City of Milpitas shall be responsible for the following:
 - Process refunds and transfers
 - Resolve customer complaints and concerns
 - Provide a single point of contact
 - Provide approved facility use permits

EXHIBIT B
(COMPENSATION MANNER AN AMOUNT)

Terms of Agreement: It is agreed that payment to Contractor for work rendered hereunder shall be made within thirty (30) days of class completion as herein indicated:

Contractor shall receive 80% of Milpitas resident receipts, and non-resident receipts, except the City of Milpitas will retain the additional \$10.00 non-resident fee.

Payment amount will be determined by the number of completed classes per session, with three sessions (Fall, Spring, Summer) during the given year. Payment will be rendered the following Monday of the completed class, totaling the number of participants times the class fee, divided by 80%, will total payment.